

STATEMENT OF THE CASE

ISSUES

Respondent requests review of the ALJ's finding that claimant is entitled to work disability. Respondent argues that claimant has preexisting cervical degenerative disc disease; that claimant did not lose any time from work as a result of his work-related injury; and that claimant was involved in an automobile accident in 2007 which caused injury to his thoracic spine. Further, respondent contends the evidence shows that the restrictions of Dr. David Hufford were assigned because of claimant's advancing liver disease, not the accidental injury. Respondent argues that claimant is ineligible for work disability because, even if claimant's restrictions were provided for the work-related injury, they cannot support a task loss if they are for the shoulder, a scheduled injury, and not the neck. Respondent also asserts that claimant's wage loss was due to his underlying liver disease and not for the cervical spine. Accordingly, respondent asks the Board to modify the Award to find that claimant sustained a 4 percent permanent partial impairment to the right upper extremity at the level of the shoulder or, in the alternative, the Board should average the shoulder ratings of Drs. Fluter and Hufford and find claimant has a 9.5 percent permanent partial impairment to the right shoulder.²

Claimant argues the evidence shows that he sustained injuries to his right shoulder and neck; that he had restrictions from both Dr. Fluter and Dr. Hufford; and that he has not worked for wages since November 2008. Claimant contends³, based on Dr. Hufford's testimony, that he sustained a 57.5 percent work disability (15 percent task loss plus 100 percent wage loss divided by 2), and based on Dr. Fluter's testimony, he sustained an 81.5 percent work disability (63 percent task loss plus 100 percent wage loss divided by 2). Claimant asks the Board to modify the Award and find that claimant has an 81.5 percent work disability.

The issue raised for the Board's consideration is the nature and extent of claimant's disability.

FINDINGS OF FACT

Claimant was age 51 when he testified at the regular hearing. He was employed by respondent for a total of 3 1/2 years as a line welder, which required claimant to bend, perform overhead work, and lift weights from 1 to 100 pounds. On February 7, 2006, as claimant was welding, he stepped backward, tripped and fell into a basket, and injured his right arm, right shoulder, and neck. Claimant reported the injury and was sent by respondent to its company physician, Dr. Jay Wedel. Claimant was referred to Dr. John

² Respondent's counsel conceded in oral arguments that claimant has a general bodily disability, not a scheduled injury. The parties do not agree regarding claimant's specific impairment of function.

³ It should be noted that claimant's arguments are based on Mr. Hardin's task list which includes a number of duplicated tasks.

Estivo⁴ for treatment and to Industrial Sports Medicine for physical therapy. Dr. Estivo released claimant from treatment on July 26, 2006. Claimant testified that Dr. Estivo restricted him from overhead work, however, claimant admitted that he was unaware of any restrictions imposed by Dr. Estivo. Claimant continued to be seen by Dr. Wedel, who became claimant's personal care provider.

Following the accidental injury, claimant continued to work for respondent on light duty. He was not required to lift in excess of 50 pounds or work overhead for sustained periods.

On June 17, 2007, claimant was involved in an automobile accident in which he sustained a fractured vertebra in his thoracic spine, either at T1 or T2. According to claimant, he did not injure his right arm, right shoulder, or cervical spine in the motor vehicle accident. In 2007 claimant was diagnosed with primary biliary cirrhosis and was placed on a liver transplant list.

Claimant admitted being told, after his 2006 accident, by Dr. Flutter and also perhaps by Dr. Kris Lewonowski, an orthopedic surgeon, that he had degenerative disc disease in the cervical spine. However, claimant had neither pain in, nor treatment for, his right shoulder and cervical spine before February 7, 2006.

After the February 7, 2006, event, claimant's neck and right shoulder pain worsened. Dr. Wedel referred him to Dr. Lewonowski, whom claimant initially saw on September 23, 2008.⁵ At some point, Dr. Wedel notified respondent by letter that claimant could no longer work. Claimant's last day of work for respondent was November 28, 2008. Claimant testified that he left work partially due to his work-related injuries and partially due to his liver disease. However, in claimant's estimation, his inability to work is solely related to his work injury, not his liver disease. Respondent did not stop providing claimant with accommodated work, however, claimant testified "[t]here was a lack of work at the time, wasn't enough work for the light duty."⁶ Claimant continued to have pain in the right arm, right shoulder, and neck.

Claimant has not been employed since November 28, 2008. He has been receiving Social Security disability benefits since 2008. Claimant reviewed the work tasks identified and described in Jerry Hardin's report and confirmed their accuracy.

Dr. David Hufford is board certified in family practice and sports medicine. On November 12, 2009, he conducted an independent medical examination at the request of

⁴ Dr. Estivo did not testify nor were his records offered into evidence.

⁵ Dr. Lewonowski did not testify nor were his records offered into evidence.

⁶ R.H. Trans. at 41.

respondent's attorney. Dr. Hufford prepared narrative reports dated November 12, 2009, and April 12, 2010. Claimant provided Dr. Hufford a history of his February 6, 2006, accident and the conservative treatment and diagnostic testing he had received, which consisted of physical therapy, an MRI of the cervical spine, a nerve conduction study of the right upper extremity, and two cervical epidural steroid injections. Treatment did not improve his symptoms.

After reviewing claimant's medical records and performing a physical examination, Dr. Hufford diagnosed claimant with a sprain of the cervical spine. He found that claimant had significant residual myofascial symptoms in the cervical spine that had reached a state of chronicity. In Dr. Hufford's opinion, claimant's accident caused injury to the myofascial structures of the cervical spine. Dr. Hufford acknowledged that before claimant's work-related accident, he had cervical degenerative disc disease which could have been aggravated by the accident. A portion of claimant's neck pain could be referred pain from his shoulder. Dr. Hufford did not think claimant's car accident in June 2007 caused more than a temporary aggravation of his cervical spine.

Dr. Hufford testified that claimant's primary injury was to his shoulder rather than the neck, and he diagnosed claimant with a traction injury to the right upper extremity. If claimant would undergo a liver transplant and recover in an acceptable manner from his liver disease, his shoulder could be provided with additional treatment, including possible surgery. If so, then claimant possibly could reach a full and unrestricted status. Dr. Hufford testified he believed claimant's shoulder condition warranted permanent restrictions. He recommended claimant restrict his lifting to 10 pounds constant lifting with his right arm, frequent lifting to 20 pounds with the right arm, occasional lifting to 35 pounds with the right arm, and no lifting greater than a 50-pound two-handed lift. Dr. Hufford also recommended claimant limit overhead use of his right arm.

Dr. Hufford rated claimant's permanent impairment based on the *AMA Guides*.⁷ Claimant's cervical injury satisfied the criteria of Cervicothoracic Category II for a 5 percent whole person impairment. For loss of range of motion in the right shoulder, he rated claimant as having a 4 percent impairment to the right upper extremity, which converts to a 2 percent impairment to the whole body. Dr. Hufford found that when the two impairments are combined under the *AMA Guides*, claimant has a 7 percent whole person functional impairment.

Dr. Hufford reviewed the task list prepared by Jerry Hardin and opined that of the 22 unduplicated tasks on the list, claimant was unable to perform 4 for an 18 percent task loss (4 is 18 percent of 22). Dr. Hufford testified claimant's inability to perform those four tasks resulted from his shoulder injury, not from his cervical injury.

⁷ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. George Flutter is board certified in physical medicine and rehabilitation. He examined claimant on July 22, 2009, at the request of claimant's counsel. Claimant provided Dr. Flutter with a history of his February 6, 2006, injury. Dr. Flutter reviewed medical records documenting claimant's treatment. Claimant told Dr. Flutter he had pain affecting the right side of his neck/upper back, right shoulder, and right arm. Dr. Flutter diagnosed claimant with neck/upper back pain; cervicothoracic sprain/strain; myofascial pain affecting the neck/upper back; right shoulder pain and impingement; and possible internal derangement of the right shoulder. Based on the information available to Dr. Flutter, he opined there was a causal/contributory relationship between claimant's current condition and the reported injury.

Using the AMA *Guides*, Dr. Flutter rated claimant at 15 percent permanent partial impairment to the right upper extremity for range of motion deficits in the right shoulder. The upper extremity rating converts to a whole body impairment of 9 percent. For the cervical injury Dr. Flutter found claimant met the criteria within Cervicothoracic Category II for a 5 percent impairment to the whole body for myofascial pain. Using the Combined Values Chart, claimant's total whole body impairment, in the opinion of Dr. Flutter, was 14 percent.

Dr. Flutter examined claimant a second time on November 16, 2010, also at the request of claimant's attorney. Since his first examination, claimant had undergone MRI scans of the spine and right shoulder. Claimant reported he had a couple of tears in the right shoulder and some process involving his cervical vertebrae, but he had not had treatment for those conditions. Claimant also said he had been diagnosed with significant coronary artery disease and had undergone a quadruple coronary artery bypass in October 2010. Claimant told Dr. Flutter he had pain affecting the neck/upper back, right shoulder, right arm, and right lower extremity. His pain was constant and had no pattern. He experienced numbness in the right thigh and has weakness in his grip.

After examining claimant once again, Dr. Flutter diagnosed claimant with neck/upper back pain; cervicothoracic strain/sprain; myofascial pain affecting the neck/upper back; cervical discopathy at C5-6; small annular tear at C6-7; right shoulder pain/impingement; possible right shoulder internal derangement; and probable bilateral medial epicondylitis. Dr. Flutter did not believe the epicondylitis was a result of the work accident. Dr. Flutter's permanent impairment ratings and causation opinions remained the same as in 2009.

Dr. Flutter placed the following restrictions on claimant after the November 2010 examination: lifting, carrying, pushing and pulling should be restricted to 20 pounds occasionally and 10 pounds frequently; avoiding holding the head and neck in awkward and/or extreme positions; overhead activities restricted to an occasional basis; activities at or above shoulder level using the right arm restricted to an occasional basis; activities greater than 24 inches away from the body using the right arm restricted to an occasional basis; and repetitive flexion, extension, pronation and supination of each elbow restricted

to an occasional basis. Dr. Fluter made a number of recommendations for future medical treatment.

Dr. Fluter reviewed the task list of Jerry Hardin. Of the 22 unduplicated tasks tasks on the list, he stated claimant was unable to perform 15, which computes to a 68 percent task loss (15 is 68 percent of 22). Dr. Fluter opined that based on claimant's underlying medical conditions, particularly with respect to his liver disease, it would be difficult for him to maintain employment on a regular and consistent basis.

Dr. Fluter testified that none of his recommended restrictions are related to claimant's liver disease. The restrictions are not related to claimant's degenerative cervical disease but to the injuries claimant sustained to the neck and shoulder, specifically the myofascial pain component for the neck and upper back and the right shoulder impingement and possible internal derangement.

At the request of claimant's attorney, claimant met with human resources consultant, Jerry Hardin, on December 9, 2010, for the purpose of performing a task performance capacity assessment. Mr. Hardin compiled a list of 40 work tasks claimant performed in the 15-year period before his accident. Twenty-two of the work tasks were nonduplicative. Claimant was not working at the time of the interview.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall

not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.⁸ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.⁹

ANALYSIS

The parties stipulated at the regular hearing that this claim is compensable. The uncontradicted evidence establishes that claimant injured his right shoulder and cervical spine in the February 7, 2006, accident. Both of the physicians who provided expert testimony confirm that claimant's injuries encompass not only the right shoulder but also the cervical spine. Both physicians also agreed that claimant sustained permanent impairment of function to the neck and the right shoulder. Claimant's testimony, which is relevant to the issue of his physical condition,¹⁰ is consistent with the testimony of the physicians.

The Act recognizes two different classes of injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body part or a permanent general bodily disability.¹¹ It is the situs of the disability, not the situs of the trauma, that determines which benefits are available.¹² An accident that results in permanent impairment to a shoulder and the cervical spine is compensated as a general bodily disability.¹³

⁸ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

⁹ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

¹⁰ See *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

¹¹ K.S.A. 44-510d; K.S.A. 44-510e.

¹² *Bryant v Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

¹³ See, e.g., *Stein v Wal-Mart*, No. 247,743, 2002 WL 31950521 (Kan. WCAB December 31, 2002).

The Board finds that claimant's permanent impairment of function is 10.7 percent to the whole body, which is essentially midway between the ratings of the two testifying physicians. The Board is not persuaded that either rating opinion of Dr. Fluter or Dr. Hufford should be accorded significantly more weight than the other.

In arguing that work disability is not recoverable in this claim, respondent points to claimant's preexisting degenerative disease in his cervical spine. However, Dr. Hufford testified that any aggravation of the cervical degenerative disease was temporary only.¹⁴ Dr. Fluter testified that claimant's neck and right shoulder injuries were caused or aggravated by the February 7, 2006, accident.¹⁵ Hence, respondent's argument regarding claimant's cervical degenerative disease provides no basis upon which to reverse the ALJ's findings regarding work disability.

The other arguments raised by respondent are also without merit. Respondent emphasizes that claimant was injured in a motor vehicle collision on June 17, 2007. The injury resulting from that event was a fracture of a thoracic vertebra either at T1 or T2. Dr. Fluter and Dr. Hufford agreed that this motor vehicle collision played no part in claimant's current shoulder and neck symptoms. Respondent asserts that the restrictions of Dr. Hufford relate only to the shoulder injury, not the cervical injury. Respondent cites no authority to support the notion that claimant is not entitled to work disability because his restrictions are a consequence of only the shoulder injury, not the cervical injury. The wording of K.S.A. 44-510e, quoted above, contains nothing which supports respondent's contention. Respondent also argues that work disability should be disallowed in this claim because claimant evidently missed no time from work from the date of accident until he left respondent's employ. Again, respondent cites no authority to support the relevancy of this contention to the findings of the ALJ regarding work disability.

Respondent takes the position that no work disability should be awarded because Dr. Hufford's restrictions result from claimant's liver disease, not claimant's injuries. However, the record does not support that contention. Dr. Hufford testified that his restrictions are not related to claimant's liver condition, but rather to the injuries sustained by claimant in this claim.¹⁶

Last, respondent contends that claimant's wage loss results from his liver disease, not the neck and shoulder injuries. This too is in conflict with the uncontradicted evidence. Claimant testified that the reasons he stopped working for respondent were his injuries and

¹⁴ Hufford Depo. at 10.

¹⁵ Fluter Depo. at 25.

¹⁶ Hufford Depo. at 32, 33.

his advancing liver disease.¹⁷ Moreover, with regard to the cause of claimant's wage loss, the latest holdings of our appellate courts render this argument unpersuasive. Under the statutory interpretations of *Bergstrom*¹⁸ and *Tyler*¹⁹ the reason for the employee's wage loss is irrelevant in determining whether, and to what extent, work disability should be awarded.²⁰ There need be no nexus between claimant's wage loss and the injury.

The Board is persuaded that the ALJ's award should be modified to find a 71.5 percent work disability. The Board is persuaded that the ALJ was correct in providing equal weight to the task loss opinions of Dr. Fluter and Dr. Hufford. However, the award should be based on a task loss finding of 43 percent, which is midway between the task loss opinions of those physicians considering only the unduplicated tasks identified by Mr. Hardin (Dr. Hufford's 18 percent plus Dr. Fluter's 68 percent = 86 percent divided by 2 = 43 percent).

CONCLUSION

(1) Claimant satisfied his burden of proof to persuade the trier of fact by a preponderance of the credible evidence that it is more probably true than not true that he sustained a 10.7 percent permanent impairment of function to the whole body as a result of the February 7, 2006, accident.

(2) Claimant satisfied his burden of proof to persuade the trier of fact by a preponderance of the credible evidence it is more probably true than not true that he sustained a 71.5 percent work disability as a result of the February 7, 2006 accident and is accordingly entitled to permanent partial disability compensation pursuant to K.S.A. 44-510e based on the work disability found herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated September 30, 2011, is hereby modified to find that claimant has a 71.5 percent work disability but is otherwise affirmed.

¹⁷ R.H. Trans. at 33, 34.

¹⁸ *Bergstrom v Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

¹⁹ *Tyler v Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

²⁰ See also *Smith v Hy-Vee Food Stores*, No. 105,911 (Kansas Court of Appeals unpublished opinion filed December 16, 2011) (award of work disability affirmed even though claimant voluntarily quit working); *Criswell v U.S.D* 497, No. 104,517 (Kansas Court of Appeals unpublished opinion filed November 10, 2011) (award of work disability affirmed despite claimant's termination for cause for post injury misconduct); *Osborn v U.S.D* 450, No. 102,674 (Kansas Court of Appeals unpublished opinion filed November 12, 2010) (award of work disability affirmed when claimant voluntarily quit working).

Claimant is entitled to 44.41 weeks of permanent partial disability compensation at the rate of \$467 per week or \$20,739.47 for a 10.7 percent functional disability. Beginning November 29, 2008, claimant is entitled to 169.73 weeks of permanent partial disability compensation at the rate of \$467 per week not to exceed \$100,000 for a 71.5 percent work disability.

As of January 25, 2012, there would be due and owing to the claimant 209.12 weeks of permanent partial disability compensation at the rate of \$467 per week in the sum of \$97,659.04 for a total due and owing of \$97,659.04, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$2,340.96 shall be paid at the rate of \$467 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of January, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
Timothy A. Emerson, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

Dated this _____ day of February, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

James B. Zongker, Attorney for Claimant
Timothy A. Emerson, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge